



June 28, 2018

*Via Electronic Submission*

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street SW  
Washington, DC 20554

***Re: Comments in Response to Notice Seeking Comments on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision [Docket No. 18-152, 02-278]***

To Whom It May Concern,

Discover Financial Services ("Discover") appreciates the opportunity to provide comments to the Federal Communications Commission ("FCC") in connection with its Notice Seeking Comments on Interpretation of the Telephone Consumer Protection Act ("TCPA" or the "Act")<sup>1</sup> in Light of the D.C. Circuit's *ACA International* Decision.<sup>2</sup> Discover supports the FCC's efforts to differentiate legitimate business calls from bad actors who make abusive and unwanted calls to consumers. We join with other businesses and trade organizations in recommending a common sense interpretation of the TCPA that will allow us to better serve and communicate with our customers.

Discover is one of the leading direct banks in the United States, and our brand is built upon a foundation of providing industry-leading customer service and pioneering products and features driven by consumers' changing needs. Customer service and satisfaction are core to our values and our mission. Making customer satisfaction a key priority is reflected by the success Discover has had in this space, as shown by the recognition Discover has received for customer service and loyalty, including J.D. Power's "Highest in Customer Satisfaction with Credit Card Companies, Three Years in a Row" (2014-2016).

Discover's ability to communicate with its customers and provide a high level of customer service is significantly hindered by the expansive interpretation of the TCPA set forth in the FCC's 2015 *Omnibus Order*. This interpretation strays from the statute's original intent and imposes unreasonable burdens on good-faith efforts to provide customers with important, helpful and time-sensitive information. As a result, TCPA compliance is now an exceedingly complex proposition

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<sup>1</sup> The TCPA is codified at 47 U.S.C. § 227. The FCC's implementing rules are codified at 47 CFR § 64.1200.

<sup>2</sup> *ACA International, et al. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

for businesses and diverts significant resources away from their core mission of customer service and instead must maintain extensive processes necessary to comply with the Order.

Congress enacted the TCPA in 1991 to prevent abusive telemarketers from making “intrusive, nuisance calls” to consumers that tied up their phone lines at their expense.<sup>3</sup> However, it was never the intention of the Act to prevent legitimate businesses from communicating beneficial information to their customers.<sup>4</sup> The D.C. Circuit’s ruling in *ACA International* recognized that changes to the *Omnibus Order*’s interpretation are necessary to ensure future TCPA implementation is consistent with the plain language of the statute and legislative intent, while also applicable to evolving communication technologies and the growing need for businesses to make timely communications to their customers. The most desirable result for both consumers and businesses is a clear TCPA interpretation that effectively protects consumers without depriving them of access to important information.

To this end, Discover recommends the following revisions to the FCC’s interpretation and implementation of the TCPA in light of the *ACA International Decision*:

**I. The FCC Should Adopt the Definition of Automatic Telephone Dialing System Set Forth in the U.S. Chamber’s Petition for Declaratory Ruling.**

On May 3, 2018, the U.S. Chamber Institute for Legal Reform and 17 other trade associations filed a Petition for Declaratory Ruling asking the FCC to: (1) confirm that to be considered an automatic telephone dialing system (“ATDS”) under the Act, the equipment must use a random or sequential number generator to store or produce numbers and dial those numbers without human intervention; and (2) find that only calls made using actual ATDS capabilities are subject to the TCPA.<sup>5</sup> Discover supports these recommendations, which properly track the statutory language of the Act and provide much-needed clarity that will improve the ability of businesses to comply with the TCPA.

The Act defines an ATDS as “equipment which *has* the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”<sup>6</sup> In *ACA International*, the D.C. Circuit held that the FCC’s expansion of this language to include devices without the present capability to generate random numbers and dial them was “incompatible with the statute’s goals” and “utterly unreasonable.”<sup>7</sup> Instead, the Act’s use of the present tense (“has”) demonstrates the proper definition of “capacity” to mean only the present ability of the equipment *at the time of its use*, not its theoretical capacity to perform such tasks after modification. Limiting the definition of ATDS to a device’s “present capacity” both honors the original intent of the statute and provides a bright-line rule for businesses to follow when deciding what equipment is appropriate for use in calling customers.

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<sup>3</sup> Telephone Consumer Protection Act of 1991, PL 102-243, 105 Stat. 2394 § 2 (Dec. 20, 1991).

<sup>4</sup> See *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C. Rcd. 1830, ¶121 (2012).

<sup>5</sup> Petition for Declaratory Ruling, U.S. Chamber Institute for Legal Reform, *et al.*, CG Docket No. 02-278 (May 3, 2018) (“Chamber Petition”).

<sup>6</sup> 47 U.S.C. § 227(a)(1) (emphasis added).

<sup>7</sup> *ACA Int’l*, 885 F.3d at 699-700.

Similarly, the FCC should clarify that a device which requires any human intervention to generate a list of numbers and dial them is not an ATDS. This clarification returns to the FCC's original definition of ATDS as equipment with the "capacity to dial numbers *without human intervention*."<sup>8</sup> It also employs a common sense reading of the word "automatic," as explained by the D.C. Circuit in *ACA International*, "'auto' in autodialer – or equivalently, 'automatic' in 'automatic telephone dialing system – would seem to envision non-manual dialing of telephone numbers."<sup>9</sup> Adopting this straightforward interpretation will facilitate the ability of businesses like Discover to provide customers with beneficial communications, such as fraud investigation updates and payment reminders. Additionally, it will allow businesses to focus resources on creating innovative products and providing services for their customers rather than maintenance of complex systems required to align with the prior definition. Too often, businesses are unable to justify investment in the resources necessary to develop innovative improvements to consumer financial services products because of litigation risk arising from uncertain legal requirements. The FCC can address this uncertainty in the first instance by adopting the recommended definition of ATDS.

## **II. The FCC Should Clarify That "Called Party" Means "Intended Recipient."**

The FCC seeks comment on how to treat calls to reassigned wireless numbers under the TCPA, and specifically how to interpret the term "called party" for calls to reassigned numbers. Discover joins with organizations such as the American Financial Services Association and others who recommend the FCC take this opportunity to clarify that the term "called party" means the "intended recipient" of the call, and that a business is not liable under the TCPA for calling a reassigned number when the caller has no actual notice the number was, in fact, reassigned.

Under this new approach, so long as a business has prior express consent from the "intended recipient" it should not be liable for calls made to a reassigned number unless the business has actual notice the number was reassigned. Only calls made to the number after the caller had actual notice of reassignment would create TCPA liability. Businesses could then reduce reliance on costly third-party vendors used to determine number ownership, and instead reasonably rely upon the consents they validly obtained from customers. To show reasonable reliance, businesses could establish processes including: (1) mechanisms for customers to give notice of reassignment; (2) periodic verification of customer contact information; or (3) checking numbers against a reassigned numbers database.

This approach best serves consumers by reducing counterproductive complexity and burdens on businesses that result from exposure to unwarranted TCPA liability. As a threshold matter, businesses like Discover seek only to contact their actual customers and have no incentive to waste time repeatedly dialing numbers reassigned to non-customers. However, as Chairman Pai stated in his dissent to the 2015 TCPA Omnibus Order, "...even the most well-intentioned and well-informed business will sometimes call a number that's been reassigned to a new person. . . . Even if a

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<sup>8</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14014, 14091-92 ¶ 132.

<sup>9</sup> *ACA Int'l*, 885 F.3d at 703.

company has no reason to know its calling a wrong number, it'll be liable.”<sup>10</sup> Moreover, punishing companies who are acting in good faith to contact customers whose phone numbers have been reassigned without notice to the business, operates to chill businesses’ ability to communicate with and provide the most effective service for their customers. Likewise, the burden and expense associated with unwarranted litigation arising from calls made to phone numbers that have been reassigned without notice detracts from businesses’ ability to serve their customers, while simultaneously increasing the costs of those services for consumers.

For the aforementioned reasons, the best solution going forward is for the FCC to clarify that “called party” means “intended recipient.” Additionally, the FCC should explore the creation of a voluntary-to-use, centralized reassigned numbers database. Discover recommends it provide a safe harbor for callers who use the database but inadvertently call a reassigned number. The safe harbor should apply to businesses who check against the database on a specified update schedule and account for inadvertent calls caused by database downtimes, technical issues and other information errors. The database should include the reassigned phone number and the number’s active/disconnected dates, but not the owner’s personal information such as name or address. It should also include an appeal mechanism for businesses to resolve any disputes with the information it contains.

Discover appreciates the FCC’s attention to this issue and the need for continued notice and comment rulemaking in this space. Millions of wireless numbers are reassigned each year and there is no perfect solution or database that can prevent all inadvertent calls to reassigned numbers.<sup>11</sup> Given this volume, the FCC should provide a safe harbor for good-faith callers who attempt to use the database to avoid calls to reassigned numbers.

### **III. The FCC Should Allow Parties to Contract for Reasonable Revocation of Consent Methods or in the Alternative, Provide Clear Guidance for Businesses and Consumers to Follow.**

While the D.C. Circuit’s decision in *ACA International* upheld a consumer’s right to revoke consent “through any reasonable means clearly expressing a desire to receive no further messages from the caller,”<sup>12</sup> the basic question of what constitutes “reasonable revocation” remains undefined, leaving both businesses and consumers with uncertainty. The FCC should use this opportunity to eliminate this uncertainty by (1) confirming that consumers and those with whom they choose to conduct business may enter into an agreement setting forth the means by which they communicate with one another, to include how customers may go about changing their communication preferences; or in the alternative (2) providing guidance for how consumers may “reasonably” revoke consent.

The FCC should confirm that businesses are free to reach an agreement with customers for the use of specific revocation methods. Allowing parties to contract for reasonable methods is the most preferable approach because it resolves any and all questions about how customers may

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<sup>10</sup> 2015 TCPA Omnibus Order at 8087, Dissent of Commissioner Ajit Pai.

<sup>11</sup> 2015 TCPA Omnibus Order, Dissenting Statement of Commissioner Ajit Pai at 9.

<sup>12</sup> See *ACA Int’l*, 885 F.3d at 692


revoke consent. Simply put, any method provided for by the agreement is considered “reasonable” because the parties mutually agree it is reasonable. This approach works well in other areas of consumer law such as Regulation Z, which requires lenders to set forth in lending agreements specific methods (telephone number, email address, web site location, mailing address) for customers to follow when giving notice of a billing error.<sup>13</sup> The approach has been successfully utilized by the lending industry for nearly 50 years because all parties know exactly what constitutes “good” notice and can conduct themselves accordingly. Providing similar clarity in the TCPA arena will end the ambiguity that drives customer confusion arising from the current hazy approach.

Alternatively, should the FCC not be inclined to allow parties to choose their favored methods of revocation, Discover suggests it create guidelines providing examples of “reasonable” methods to revoke consent and allow businesses who follow those guidelines a safe harbor from TCPA liability. For convenience, such guidelines would provide consumers with examples of multiple revocation methods across different communications channels such as telephone, letter, email, text and the internet. The guidelines might also specify unconventional methods that are *excluded* from the FCC’s definition of “reasonable.” Such an approach will provide much needed clarity for both consumers attempting to revoke consent and businesses attempting to comply with the TCPA.

#### IV. Conclusion

We thank the FCC for the opportunity to comment on this Notice and respectfully ask for consideration of the recommendations and suggestions in this letter. In adopting these recommendations, the FCC will better fulfill the TCPA’s original intent by appropriately targeting bad actors and protecting consumers without preventing legitimate businesses from communicating important, time-sensitive information and providing outstanding service to their customers.

Sincerely,



Mark Scarborough  
Senior Vice President, Card Operations

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<sup>13</sup> 12 CFR 1026.13, 12 CFR 1026.7(a)(9), 12 CFR 1026.9(a)(2).